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In the Supreme Court of the United States

OCTOBER TERM, 1971

MORTON E. SCHNEIDER, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a–6a) is reported at 441 F. 2d 1320. The opinion of the district court (App. A, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1971. The petition for a writ of certiorari was filed on July 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an attorney who has represented a Social Security claimant at the administrative level is en-

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titled to judicial review of the administrative decision that a fee of $500 for the attorney's work on the case was reasonable.

STATUTE AND REGULATIONS INVOLVED

The relevant parts of Section 206 of the Social Security Act, as amended, 42 U.S.C. 406, and of the Social Security Regulations, 20 C.F.R. 404.975 and 404.976, are set forth in Appendix B, *infra*.

STATEMENT

Petitioner is an attorney who was retained by a social security claimant, George Bisbikis, to represent him at an administrative hearing on his claim for disability benefits. Petitioner and Bisbikis agreed in a written contract that Bisbikis would pay petitioner 25 percent of any benefits awarded to him (Pet. 2).

Petitioner spent from 14 to 16 hours on the case including a two-hour hearing which he attended with his client. Petitioner did not prepare formal briefs or argue at the hearing but claims that his psychiatric theory of the case was responsible for his client's success at the hearing (Pet. 3, Pet. App. 2a). The hearing examiner concluded that the claimant's disability was so clear-cut that "recitation of the evidence is unnecessary" (the determination is reproduced in App. C, *infra*). He awarded benefits to the claimant which totalled $11,253.70 (Pet. 3).

Petitioner then filed a petition for the approval of a 25 percent fee, or $2,808.42, the maximum which the

Secretary may certify under the statute. See 42 U.S.C. 406(a), *infra*.

The hearing examiner before whom petitioner had appeared considered the petition, as well as the factors set out in 20 C.F.R. 404.976(b) (App. B, *infra*) which govern the award of a fee, *e.g.*, the services performed, the complexity of the case, the level of competence required, the amount of time spent. The hearing examiner concluded, based upon his familiarity with the case and his observance of petitioner's performance, that a fee of $500 was reasonable (Pet. 3). On petitioner's appeal to the Appeals Council, the award was affirmed.

Petitioner then sought review under the Administrative Procedure Act, 5 U.S.C. 701, 704, in the district court, which concluded that it lacked jurisdiction to review the reasonableness of the fee (App. A, *infra*).[1] The court of appeals affirmed, one judge dissenting, holding that 42 U.S.C. 406(a) "commits to the discretion of the Secretary * * * the setting of legal fees for administrative representation of social security claimants" (Pet. App. 3a). The court pointed out that the same result had been reached in the Third Circuit, and that that decision had been cited with approval in at least three other circuits.

DISCUSSION

The court of appeals' holding that the award of fees for administrative representation of social security claimants is committed to the Secretary's discretion

[1] Since the opinion of the district court is not reprinted in the petition, we reproduce it as Appendix A, *infra*, pp. 9–12.

accords with the plain terms and intent of the Social Security Act. See 42 U.S.C. 406(a), (b) (*infra*, pp. 13–14). The same conclusion has been reached by every other court which has considered the matter, including four other courts of appeals.[2] Accordingly, further review of this question by this Court is not warranted.

1. In Section 206(a) of the Social Security Act, 42 U.S.C. 406(a), Congress has explicitly committed to the Secretary the setting of fees for administrative representation of claimants. That Section provides:

> * * * The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under [the Act]. * * *

The Section further provides that "in accordance with the regulations prescribed pursuant to the preceding sentence," the Secretary shall fix a reasonable fee and certify it for payment out of past-due benefits. Section 206(b), 42 U.S.C. 406(b), contains comparable provisions authorizing the district court to determine a fee for work done before it. The clear congressional intent was that "the agency before whom services were rendered should be the one to determine their value." *Gardner* v. *Menendez*, 373 F. 2d 488, 490 (C.A. 1).

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[2] *Chernock* v. *Gardner*, 360 F. 2d 257 (C.A. 3); *Robinson* v. *Gardner*, 374 F. 2d 949, 951 (C.A. 4); *Fenix* v. *Finch*, 436 F. 2d 831, 838 (C.A. 8); cf. *Gardner* v. *Menendez*, 373 F. 2d 488, 490 (C.A. 1).

The intent of Congress to commit administrative fee awards to the Secretary's discretion further appears from the fact that the statute does not require the Secretary to hold a hearing or to make findings with respect to these awards. Section 205(b) of the Act, 42 U.S.C. 405(b), requiring a hearing and findings in connection with benefit claims, is inapplicable to petitions for attorney fees. Nor does the Administrative Procedure Act impose these requirements. See 5 U.S.C. 556, 557. In this situation, judicial review in the ordinary sense is impossible, for the court is not in a position to determine whether the administrative action is arbitrary, capricious or unreasonable, where the administrator is not required to set forth the basis for his decision. Compare *Reconstruction Finance Corporation* v. *Bankers Trust Co.,* 318 U.S. 163, 169–170.

The failure of Congress in the Social Security Act to provide for judicial review of legal fees for administrative representation was not a legislative oversight. The Act provides specifically for judicial participation in other areas. Section 205(g), 42 U.S.C. 405(g), contains detailed provision for judicial review of decisions regarding applications for benefit payments, setting forth both the procedures and the standard of review to be followed. And the 1965 Amendments added to Section 206, 42 U.S.C. 406, a detailed provision for the determination by the courts of fees allowable for representation of Social Security claimants in court. See Public Law 89–97, 79 Stat. 403, amending 42 U.S.C. 406. The

statutory situation is, therefore, entirely different from the situation in which there is a complete absence of provision for judicial review. Compare *Dismuke* v. *United States,* 297 U.S. 167; see *Schilling* v. *Rogers,* 363 U.S. 666, 674: "The point is that in this Act Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation."[3]

2. The lower federal courts have uniformly interpreted Section 206(a) as committing administrative fee determinations exclusively to the Secretary, thereby precluding judicial review. The claim that jurisdiction to review Social Security attorney fee awards was conferred by the Administrative Procedure Act, 5 U.S.C. 701, 704, was previously rejected by the Third Circuit, which held (*Chernock* v. *Gardner,* 360 F. 2d 257, 259):

> It is apparent, however, from an examination of the statutes upon which this action is predicated, that the order of the hearing examiner setting a maximum fee of $250.00 in this case is not reviewable by the Court, because the setting of fees for representation of claimants before the Secretary is committed to that agency's discretion by Section 206 of the Social Security Act, and judicial review is therefore

[3] The present case is not in conflict with *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, relied upon by petitioner. The evidence of legislative intent to exclude review here is neither "slender" nor "indeterminate" (*id.* at 141).

precluded by Section 10 of the Administrative Procedure Act. * * *

Chernock has been cited with approval in recent cases involving similar fees for representation before the district courts. *E.g., Fenix* v. *Finch*, 436 F. 2d 831, 838 (C.A. 8); *Conner* v. *Gardner*, 381 F. 2d 497, 500 (C.A. 4); *Robinson* v. *Gardner*, 374 F. 2d 949, 951 (C.A. 4); cf. *Gardner* v. *Menendez, supra; Gonzalez* v. *Hobby*, 213 F. 2d 68, 69 (C.A. 1). As the Fourth Circuit put it in *Robinson* v. *Gardner, supra:*

> The matter of fees for legal services performed within HEW on Social Security claims has been committed by statute to the responsibility of the Secretary exclusively. This customary province of the courts has been preempted by Congress. * * *

The district courts have likewise held that administrative fee awards are not judicially reviewable. *Britton* v. *Gardner*, 270 F. Supp. 412, 414 (W.D. Va.); *Watson* v. *Celebrezze*, 246 F. Supp. 764 (E.D. Tenn); *Sheppard* v. *Flemming*, 189 F. Supp. 571, 572 (S.D. W.Va.); *Goodell* v. *Flemming*, 179 F. Supp. 806, 808 (W.D. N.Y.); cf. *Randolph* v. *United States*, 274 F. Supp. 200, 204 (M.D.N.C.), affirmed, 389 U.S. 570.[4]

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[4] While Section 206(a) was amended by Section 173 of the Social Security Amendments of 1967, P.L. 90-248, 81 Stat. 877, that amendment was in no way intended to impair the validity of *Chernock* v. *Gardner*, *supra*, as petitioner suggests (Pet. 12–13). The legislative history of that amendment makes it clear that the sponsor's intent was solely to give the Secretary the power to certify a fee for payment directly to the attorney from past-due benefits. See 113 Cong. Rec. 32821 (Statement of Senator Ervin); H. Conf. Rep. No. 1030, 90th Cong., 1st Sess., p. 55.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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Solicitor General.
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KATHRYN H. BALDWIN,
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Attorneys.

AUGUST 1971.

Petitioner is in error in stating that *Chernock* was decided under an earlier Social Security Act, one which limited an attorney's fee to $30 "absent a showing of special circumstances" (Pet. 12–13), and in drawing the inference that Congress may have wished to discourage attorneys from participating in the administrative process. The limitation to a $30 fee—with the Secretary permitting a higher fee upon a showing of "good cause"—was not contained in the statute, but was promulgated in the Secretary's regulations. 20 C.F.R. 404.976. This regulatory provision was changed in 1967 in order to preclude the mistaken notion that $30 was the only amount that an attorney could charge for work done before the Secretary. 32 Fed. Reg. 7751. The change was not made in response to any change in congressional policy—for the regulation was changed some six months before the amendment was introduced. Therefore, neither the amendment to Section 206(a) nor the changes made in 20 C.F.R. 404.976 in any way undermine the decision in *Chernock* v. *Gardner*, *supra*.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Civil Case No. 33914.)

MORTON E. SCHNEIDER, PLAINTIFF

v.

ROBERT FINCH, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on the 15th day of May, 1970.

Present: The Honorable FRED W. KAESS, United States District Judge.

This action is brought by Morton E. Schneider, an attorney, for judicial review of an administrative fee award of $500.00 for services rendered by the plaintiff in connection with the claim of one George Bisbikis (=371-32-2489) for social security disability benefits.

In his complaint plaintiff relates that he represented the social security claimant at a hearing before Hearing Examiner Joseph P. Sitek on December 11, 1968, which hearing resulted in the allowance of disability benefits with a period of disability commencing April 2, 1965.

Plaintiff further relates that he had a written contingency fee agreement with the said claimant, under

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the terms of which he was to receive 25% of accrued benefits awarded.

Upon petition by plaintiff for approval of 25% of the accrued benefits (the accrued benefits were $11,253.70, 25% of which is $2,808.42), the Hearing Examiner approved a fee of $500.00, which amount was also reviewed and approved by defendant's Appeals Council.

Plaintiff then instituted the present action pursuant to the Administrative Procedure Act, 5 U.S.C.A. § 704, alleging that the $500.00 fee is grossly inadequate and unreasonable.

The parties are presently before the court on the defendant's motion to dismiss for lack of jurisdiction or, in the alternative, for summary judgment, declaring the compensation to be adequate and reasonable.

In requesting summary judgment, the defendant maintains that the fee is adequate and reasonable, in accordance with the Social Security Act. The defendant cites 42 U.S.C.A. § 406(a) which says, in substance, that the Secretary may prescribe the maximum fees which may be charged and the Secretary shall certify for payment to the attorney whichever of the following is smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee prescribed by the Secretary, or (C) the amount agreed upon between the claimant and such attorney as the fee for such services. Thus the defendant maintains that the Secretary's decision was within his sound discretion under the law and the $500.00 is adequate and reasonable for the 16 hours spent by the plaintiff in prosecuting the claimant's case. (This amounts to a fee of $31.25 per hour.) However, the court has reservations about the 2 hours allotted to the review and preparation of the Plaintiff's Petition for Attorney Fees.

In essence, the plaintiff agrees with the defendant's statement of the law. He differs, however, as to the conclusion of adequacy and reasonableness. He contends that the $500.00 is inadequate and unreasonable and argues that the discretion of the Secretary was abused by overlooking two vital factors—(1) plaintiff's specialized training and considerable experience in Social Security matters, and (2) the contingent nature of the payment.

The two factors pointed out by the plaintiff, plus the fact that the minimum fee suggested by the Michigan State Bar Association is $35.00 per hour, leads this court to believe that a reimbursement rate of $31.25 per hour, as is reflected in the Secretary's decision, may be inadequate and unreasonable in this situation. Perhaps Mr. Schneider's expertise in this area, coupled with the contingent nature of the payment, should entitle him to something in excess of the minimum Michigan State Bar Association hourly rate.

Thus a motion for summary judgment for the defendant might not be warranted by the facts in this situation.

However, summary judgment should not be considered unless this court has proper jurisdiction over the subject matter as is the issue in defendant's motion to dismiss.

Defendant's motion to dismiss alleges that this court is without jurisdiction to hear this matter according to the Social Security Act. Defendant maintains that since 42 U.S.C.A. § 405(h) says that no findings or decision of the Secretary are reviewable "except as herein provided" and that since review of legal fees was not provided for, the enabling statute creating the Social Security Administration precludes the plaintiff from maintaining this action for review.

Defendant also cites the case of *Chernock* v. *Gardner*, 360 F. 2d 257 (3rd Cir., 1966).

The plaintiff counters by maintaining that Section 405(h) refers only to the review of the findings and decision relating to Social Security benefit entitlement, not attorney fees. Consequently, plaintiff contends that the Administrative Procedure Act, 5 U.S.C.A. § 704, applies to this matter. Section 704 states that "Agency action made reviewable by statute *and final agency action for which there is no other adequate remedy in a court* are subject to judicial review." Plaintiff also distinguishes *Chernock*, supra, indicating that in that case the action was brought pursuant to the Social Security Act, 42 U.S.C.A. § 405, which would preclude recovery; whereas the present case is brought pursuant to the Administrative Procedure Act, 5 U.S.C.A. § 704, which, as indicated above, does provide for recovery.

Thus the determination of this motion to dismiss turns upon the interpretation of 42 U.S.C.A. § 405(h).

It is the holding of this court that the review of the legal fees is precluded by the Social Security Act. As authority for this holding, the court finds, as pointed out in defendant's brief, that *Chernock* v. *Gardner*, supra, is directly in point, wherein the 3d Circuit Court of Appeals strictly construed the language of the Social Security Act regarding reviewability of the Secretary's findings and decision "except as herein provided". 42 U.S.C.A. § 405(h).

IT IS ORDERED that defendant's Motion to Dismiss be granted.

FRED W. KAESS,
United States District Judge.

APPENDIX B

Section 206 of the Social Security Act, as amended, 42 U.S.C. 406 provides in relevant part:

> (a) * * * The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall notwithstanding section 405(i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. * * *
>
> (b)(1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee

> for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

Sections 404.975 and 404.976, of the Social Security Regulations, 20 C.F.R. 404.975 and 404.976, provide in relevant part:

> § 404.975 Fee for services performed for an individual before the Social Security Administration.
>
> (a) General. A fee for services performed for an individual before the Social Security Administration * * * may be charged and received only as provided in paragraph (b) of this section.
>
> (b) Charging and receiving fee. An individual who desires to charge or receive a fee for services rendered for an individual in any proceeding under * * * the Act * * * must file a written petition therefor in accordance with § 404.976(a). The amount of the fee he may charge or receive, if any, shall be determined on the basis of the factors described in § 404.976(b) by an authorized official of the appropriate component of the Administration, where the services were concluded by an initial, reconsidered, or revised determination, or by the Bureau of Hearings and Appeals where there is a decision or action by a hearing examiner or the Appeals Council of the Social Security Administration, as the case may be. * * *
>
> * * * * *

404.976 Petition for approval of fee.

(a) Filing of petition. In accordance with § 404.975, to obtain approval of a fee for services performed before the Social Security Administration in any proceeding under the Act, a representative, upon completion of the proceedings in which he rendered services, must file at an office of the Social Security Administration a written petition which shall contain the following information:

(1) The dates his services began and ended;

(2) An itemization of services rendered by him in a proceeding under the Act, with the amount of time spent in hours, or parts thereof, on each type of service;

(3) The amount of the fee he desires to charge for services performed;

(4) The amount of fee requested or charged for services rendered in the same matter before any State or Federal court;

(5) The amount and itemization of expenses incurred for which reimbursement has been made or is expected;

(6) The special qualifications which enabled him to render valuable services to the claimant (this requirement does not apply where the representative is an attorney); and

(7) A statement showing that a copy of the petition was sent to the person represented.

(b) Factors considered in evaluating a petition for fee. In evaluating a request for approval of a fee, the purpose of the social security program—to provide a measure of economic security for the beneficiaries thereof—will be considered, together with the following factors:

(1) The services performed (including type of service);

(2) The complexity of the case;

(3) The level of skill and competence required in rendition of the services;

(4) The amount of time spent on the case;

(5) The results achieved. (While consideration is always to be given to the amount of benefits, if any, which are payable in a case, the amount of fee will not be based on the amount of such benefits alone but on a consideration of all of the factors listed in this section. The benefits payable in a given claim are governed by specific statutory provisions and by the occurrence of termination, deduction, or nonpayment events specified by law, factors which are unrelated to efforts of the representative. In addition, the amount of accrued benefits payable in a given claim is affected by the length of time that has elapsed since the claimant became entitled to benefits.);

(6) The level of administrative review to which the claim was carried within the Social Security Administration and the level of such review at which the representative entered the proceedings; and

(7) The amount of the fee requested for services rendered, excluding the amount of any expenses incurred, but including any amount previously authorized or requested.

APPENDIX C

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS—HEARING EXAMINER'S DECISION

GEORGE P. BISBIKIS, CLAIMANT.

v.

GEORGE P. BISBIKIS, WAGE EARNER.

CLAIM FOR PERIOD OF DISABILITY AND DISABILITY INSURANCE BENEFITS

Social Security Account Number 371-32-2489

This case is before the Hearing Examiner upon a request for hearing filed on October 29, 1968, by the claimant, who is dissatisfied with the prior determination disallowing his application filed on March 17, 1967, for a period of disability under section 216(i) (42 USC 416(i)) and for disability insurance benefits under section 223 (42 USC 423) of the Social Security Act, as amended.

The hearing was held on December 11, 1968, at Detroit, Michigan, with the following persons in attendance: Claimant was present and participated. He was represented by Morton Schneider, Attorney at Law. Also present at the Hearing Examiner's request, was the vocational expert, Dr. Peter G. Fotiu.

Evidence in addition to that which was considered in making the prior determination has been received

and considered by the Hearing Examiner. In view of the Hearing Examiner's conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.

The Hearing Examiner finds that the earnings requirements for disability purposes under the Act are met through the date of this decision.

After careful consideration of all the evidence of record, the Hearing Examiner finds that beginning on April 2, 1965, the claimant was under a "disability" as that term was defined in the Social Security Act prior to the Social Security Amendments of 1965, and that such disability has continued up to and through the date of this decision.

It is the decision of the Hearing Examiner that the claimant, based on his application filed on March 17, 1967, is entitled to a period of disability commencing on April 2, 1965, and to disability insurance benefits, under sections 216(i) and 223, respectively, of the Social Security Act, as amended.

Joseph P. Sitek,
JOSEPH P. SITEK,
Hearing Examiner.

FEBRUARY 24, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1971